

No. 15,987

IN THE

United States Court of Appeals  
For the Ninth Circuit

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ELMER J. FAUL and SYBELL E. FAUL,  
*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,  
*Respondent.*

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Petition to Review a Decision of  
The Tax Court of the United States.

Honorable Ernest H. Van Fossen, Judge.

PETITIONERS' OPENING BRIEF.

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**PETITIONERS' OPENING BRIEF.**

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**JURISDICTION.**

This is a petition to review a decision of the Tax Court of the United States (Tr. 33), which decision was based on the finding of fact and opinion of said Court. (Tr. 23-33.)

The Tax Court of the United States had jurisdiction of the issues raised by the petition (Tr. 3-15) under the laws of the United States, particularly under 26 U.S.C.A. 7442 (I.R.C. 1954); 26 U.S.C.A. 107(a) (I.R.C. 1939); 26 U.S.C.A. 1301 (I.R.C. 1954).

The jurisdiction of the United States Tax Court was invoked by the petition (Tr. 3-15) on the ground

that respondent erred in holding that the reported income represented by informant's award in the amount of \$68,837.96 received by petitioner husband (hereinafter called "husband") in 1952 allegedly as compensation for personal services rendered during a period of sixty-seven months, commencing in February 1944 and ending in September 1949, may not be prorated over said period in computation of petitioners' tax liability for said year. As further ground the petition alleged error on the part of respondent holding that Section 107(a) of Internal Revenue Code is not applicable to said income, but to the contrary that the same is includable in full in gross income for the year of 1952 in accordance with Sec. 22(a) of the Internal Revenue Code. (Tr. 3 and 4.) The trial was held on the 24th of June 1956 involving the issues raised by the petition (Tr. 3-15) and on the answer (Tr. 16-18) and stipulation filed (Tr. 20-23).

The decision (Tr. 33) ordered a deficiency in petitioners' income of \$18,350.23 for the taxable year 1952, as it was originally determined by respondent (Tr. 3).

This Court has jurisdiction of the review under 26 U.S.C.A. Sec. 1141 (I.R.C. 1939), 26 U.S.C.A. 7482 (I.R.C. 1954), as well as under Rule 29 of the Rules of this Court of May 27, 1923, as amended to June 18, 1956 and to August 21, 1957.

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#### **STATEMENT OF THE CASE.**

##### **Facts.**

Petitioners are formerly husband and wife who were divorced after the filing of the petition in this



case before the United States Tax Court, that the interlocutory decree of divorce was entered in the Superior Court of the State of California in and for the County of San Francisco in Cause No. 449942 and entitled *Elmer J. Faul, Plaintiff v. Sybell E. Faul, Defendant*. Said decree was filed on the 29th day of December, 1955; a final decree of divorce was entered subsequently; and that petitioner Sybell E. Faul resides in Carmel, Monterey County, California, and that the other petitioner Elmer J. Faul resides in San Francisco, California. (Tr. 20.) They filed their joint income tax return for the year 1952 with the District Director of Internal Revenue, San Francisco, California. (Tr. 20.)

Petitioner Elmer J. Faul (hereinafter called husband) was a full time employee of the R. E. Myers Company of Salinas, Monterey County, California, from approximately February 1941 to March 1946. The R. E. Myers Company was a subsidiary of the Salinas Valley Ice Co. (also known as Salinas Ice Co., Ltd.) of Salinas, Monterey County, California. (Tr. 20, 21.) The tax records were kept and the tax returns for the above-named companies were prepared by one Emmett Gottenberg, a certified public accountant of San Jose, California. (Tr. 21.)

On February 22, 1947, husband had an interview in San Francisco with John Boland, Chief Field Deputy in the office of the Collector of Internal Revenue, San Francisco, California. At that time he submitted to Boland a memorandum of alleged violations of Internal Revenue laws by the Salinas Valley Ice Com-

pany. (Tr. 21.) On the same day, February 22, 1947, he filed Form 211 as Claim No. 8990. (Tr. 21.)

Beginning with the month of March 1947, husband was interviewed by Agent Allan Shurlock and other agents to whom he gave the above mentioned memoranda as to the alleged violations, by the Salinas Valley Ice Company, of the provisions of the Internal Revenue Code. (Tr. 21.) He also corresponded in writing with officials of the Internal Revenue Service and the Treasury Department. (Tr. 21.)

In April 1952, husband received a check in the amount of \$68,837.96 as informer's award. (Tr. 22.)

The Collection Office of the Internal Revenue Service in Salinas, California, promptly demanded an estimated tax return and the payment of estimated tax with respect to the receipt by husband of the award of \$68,837.96. Payment of tax pursuant to such estimated tax return was made by petitioners in the amount of \$25,825.82. Thereafter, petitioners filed their income tax return for the year 1952 and in connection with the payment of said \$68,837.96 they claimed the benefit of Section 107(a) of the Internal Revenue Code of 1939. Accordingly, the return indicated a tax liability of \$17,150.02 and an overpayment of \$8,825.46, which overpayment was refunded by the Internal Revenue Service to petitioners. (Tr. 22.)

Thereupon, respondent determined that said sum of \$68,837.96 received by husband "was not compensation for personal services covering a period of thirty-six (36) calendar months or more within the meaning

of Section 107(a) of the Internal Revenue Code . . .”, and further determined that “the said amount of \$68,837.96 is includable in full in gross income for the year ended December 31, 1952, in accordance with Section 22(a) of the Internal Revenue Code . . .” The examining agent computed petitioners’ tax liability based upon Section 11 and Section 12 of the Internal Revenue Code on the basis of which a deficiency of \$18,350.23 was claimed. (Tr. 22, 23.)

Husband did not testify nor appear at the trial because, as his son Gene Faul testified (Tr. 10-12), he suffered a nervous breakdown and lately he was in a highly excitable state and appeared extremely nervous. This witness also stated that his father wrote to him recently numerous letters which indicated that his father’s nervous condition would not qualify him to testify in this case. (Tr. 42 and 43.)

Sybell E. Faul, petitioner (hereinafter referred to as the wife), testified on direct examination in this cause (Tr. 44-70) that she had been married to husband for thirty-one (31) years (Tr. 44); that his present condition was such that he would not be able to take the witness stand and tell a coherent story. (Tr. 45.)

Husband first went to work for R. E. Myers Co. as office manager in 1941 while living in Watsonville, California. (Tr. 45.) His immediate employer was Ralph Myers. His place of work was Salinas, California, (Tr. 45) commuting between his residence and the place of employment. Upon the insistence of Ralph Myers, petitioners moved in 1942 to Salinas. (Tr. 45.)

The wife was present at petitioners' home at various times after 1942 and heard conversations between husband and Ralph Myers. Husband pointed out that his employer was making enough money and that he ought not to cheat on his books, exposing himself to tax fraud charges. Husband told his employer that unless the fraudulent bookkeeping ceased he will terminate his employment. Ralph Myers passed off the objections lightly by saying that husband did not have to do the book work, that he "will have someone else do it." (Tr. 46.) The someone else who was hired to do the tax work was Emmett Gottenberg, a certified public accountant of San Jose, California. (Tr. 46.)

Conversations between husband and his employer Ralph Myers pertaining to the fraudulent bookkeeping took place in 1942 and 1943. (Tr. 46.)

Husband kept on worrying in spite of his employer's assurance that he would not be involved in any tax fraud charges. The wife, to save husband from worrying, suggested to him in 1943 that he quit his job with R. E. Myers Co. Her advice was not taken. (Tr. 48.)

Husband went to San Francisco in 1944 to talk to some Government men to find out just what he should do to protect himself. They told him that he should make records and have evidence to prove that he was not involved in any fraud. (Tr. 48.) He began to keep records in February or March of 1944. (Tr. 49.) She saw her husband thereafter prepare records at home or at the office during very late hours at night. (Tr. 49.)

Wife went to the office of R. E. Myers Co. where husband showed her the false book entries of which he made copies. He also used to bring the books home and make copies on the typewriter there. (Tr. 49.) Husband continued making copies of the false book entries in 1945 and 1946 (Tr. 49) and kept those copies at home in an old safe (Tr. 50).

In July 1946 wife had a conversation with Ralph Myers at Tassajara Hot Springs, California with Gottenberg present. (Tr. 50.) Before this conversation took place, Ralph Myers telephoned wife while she was in Palm Springs, and told her that he was firing husband because he was interfering with the bookkeeping and with the ways the entries were made, even though another man was hired to keep the books. Ralph Myers told her that he wanted to do something for her and, therefore, offered her Tassajara Hot Springs which he then owned. That was in 1946 and husband was fired from his job in March of that year. (Tr. 50 and 51.) Ralph Myers offered in connection with her taking over Tassajara to pay the expenses until he had built a new hotel there, after which he expected the Hot Springs to become profitable. (Tr. 51.)

Wife took over the running of the Hot Springs and moved there in April 1946 with husband who assisted her with the bar and the books. (Tr. 51.)

In July 1946 at Tassajara, husband upbraided Gottenberg for making false entries on the books of the R. E. Myers Co., and that in consequence he lost his job with the company. Gottenberg answered that "it

isn't any of your business. You had no business interfering with it at all." Ralph Myers was present at this conversation but did not participate in it. He was inebriated. (Tr. 52.)

Petitioners remained at Tassajara from April to August 1946. In the latter month, Ralph Myers was killed in an airplane accident. Even though Ralph Myers always assured wife that none of his family would interfere with her running of the Springs, as soon as he died the family began interfering and demanded that she give up the place immediately. She protested that Ralph Myers gave her one-half ( $1/2$ ) interest in the Springs, but the family denied that and Myers Sr. threatened petitioners to "break them" if they insisted in her claim, so they left Tassajara. (Tr. 53.)

Petitioners went to Salinas and husband suggested to wife that the Government be again informed of the false book entries. Wife opposed it, but husband did report it and made a claim for informer's award on February 22, 1947. (Tr. 53, see Exhibit 1-A, Tr. 56 and 57.)

(It was stipulated that husband went with his information to the Internal Revenue Service in San Francisco prior to February 22, 1947. (Tr. 55.))

Petitioners went together with the information concerning fraudulent bookkeeping by the R. E. Myers Co. to one John J. Boland, Deputy Collector of the Internal Revenue Service in San Francisco. (Tr. 59, see Exhibit 1-A.) Boland told husband that he would have to have a great deal more information than he

supplied at that visit, and he also told petitioners that his agents would contact them. (Tr. 59.) It was not long after that, that Van Schroeder, Shurlock and another agent, Jack O'Connell, of the Internal Revenue Service came to petitioners' home in Salinas. (Tr. 59.)

Thereafter, the Revenue Agents were in petitioners' home for a long time. It seemed to wife that they were coming back for an eternity. There were Government men in the house until wife felt that it was not her home but the Internal Revenue Bureau. (Tr. 59.)

After several years of coming and going on the part of the Internal Revenue Agents to the petitioners' home in Salinas, husband became extremely nervous, and petitioners moved to Carmel in 1948. (Tr. 59.)

The Internal Revenue Agents came to petitioners' home for the purpose of obtaining information as to Ralph Myer's fraud. (Tr. 59.) Agents Schroeder and Shurlock assured husband that the Internal Revenue Service would never have found any of the fraud and any of the false entries if it hadn't been for his help. (Tr. 59.) The Internal Revenue Agents were in petitioners' home in 1948 in connection with the tax information. The agents were always asking husband for information and wife is sure that he supplied them with plenty of it. It seemed to the wife that the Revenue Agents were in her home all the time in 1948. (Tr. 60.)

In 1949 husband saw only Revenue Agent Shurlock who always came to their home in Carmel on the Government case. Shurlock never was an intimate

friend and wife did not know him before this Government case came into her life. (Tr. 60 and 61.)

Petitioners bought their Carmel home and moved into it in January 1949. Agent Shurlock came there in 1949 to get information on the Myers' case. Husband and Agent Shurlock always met with reference to the Government case. Wife saw the two of them taking out the records and the files that husband had collected during the years since 1944. (Tr. 61.)

Those who made the false entries did not know how to use the big bookkeeping machine and used it while the operator was on her vacation. They evidently practiced for hours, and wife saw the practice papers which had been thrown all around the office. They jammed the bookkeeping machine and when the operator came back from her vacation, she couldn't operate it. They had to have a great deal of repair work done on the machine. (Tr. 61 and 62.)

Wife recalls that Mr. Boland called husband in 1950 to come to San Francisco. She went with him and thought that they were going to the Internal Revenue Building, but Boland had them come to his apartment. He asked husband for additional information. (Tr. 62 and 63.) Petitioners never saw Boland except in connection with the Myers' tax case. (Tr. 63.)

Wife recalls a letter written in 1950 to husband by Mr. Parsons, Assistant Secretary of the Treasury in Washington. This letter said that they had to have more information on the Myers' tax case before they



could pay him his reward. The letter also said that he could not be paid his reward unless they went back over the books and got more information. The same thing was told to husband when petitioners were in New York. (Tr. 63.) (See Exhibit 3, Parson's letter of September 10, 1951.) (Tr. 92 and 93.)

Internal Revenue Agent Shurlock came to petitioners' home in Carmel in 1950 to talk to husband. The conversation between the two was never about anything else but the Government case. (Tr. 64 and 65.)

Wife recalls a conversation between Agent Shurlock and husband in 1950 or 1951 pertaining to the fraud penalty against the Myers Co. Shurlock did not think that there would be a penalty, but if there were one, it would be a large amount. (Tr. 65.)

Agent Shurlock, his wife, and petitioners were in petitioners' house in 1950 or 1951, when Shurlock said that the Myers' fraud penalty would be about \$500,000, and if the penalty turned out to be as much then husband's reward would be twice as much as Shurlock first thought it to be. (Tr. 65 and 66.)

Husband received in 1952 an informer's award of \$68,837.96. Petitioners filed an estimated tax return and they paid an estimated tax on the award of \$28,000.00. A refund of \$8,825.46 was made by the Revenue Service to petitioners. (Tr. 67.)

Wife received no part of the \$68,837.96 informer's award, all of which was kept by the husband. The wife borrowed \$10,000 from the husband, but she paid it back to him in full. (Tr. 69.)

Form No. 211, part of Exhibit 1-A, shows that the husband's claim in the amount of \$68,837.96 was allowed in the case of "Salinas Valley Ice Co., Ltd. and Ralph E. Myers, Deceased" to be paid as "Salaries and Expenses, Bureau of Internal Revenue." The claim for award (Exhibit 1-A) refers to information supplied by husband "which led to detection of a violation of the Internal Revenue laws of the United States by Ralph E. Myers Co., Salinas, California." Government attorneys claimed that the Ralph E. Myers Co. "was just a fictitious name used for the operations of the Salinas Valley Ice Company" (Tr. 57, part of Exhibit 1-A, Tr. 70.)

The husband, while working for Ralph Myers in 1944, 1945 and 1946, did not supply the Government with the tax fraud records, because the Government did not ask for them. (Tr. 71.) The husband gave the Government "everything they asked for and everything they wanted. Maybe they did not want the records." (Tr. 71.)

From 1946 to 1950 Government Agent Shurlock was in petitioners' home maybe thirty (30) times. (Tr. 73.)

When in 1944 petitioners went to San Francisco, the husband phoned to the Internal Revenue Service for an appointment, and the wife believes that he saw Mr. Boland of the Revenue Service. The husband went to see the Revenue Service in 1944 to protect himself at that time. (Tr. 74.)

When Revenue Agent Shurlock came to petitioners' home from 1947 to 1950 and brought Mrs. Shurlock

with him, she would be playing the piano while Agent Surlock was always with husband. Mrs. Shurlock complained that they could have fun if the visits were not always for business. (Tr. 75.)

Allan Russell Shurlock (hereinafter and hereinbefore for the sake of brevity referred to as Agent or Agent Shurlock) testified that he was employed by the Internal Revenue Service, and that he became acquainted with husband in 1940 or 1941, while making an audit of a claim filed by Salinas Valley Ice. Co. Husband was at that time office manager of a branch office of the Ice Co. known as Ralph E. Myers Co. (Tr. 77 and 78.) Agent met husband later again in April 1947 at petitioners' home in Salinas. Fraud contact Agent O'Connell of the San Francisco Division of the Internal Revenue Service was also present. (Tr. 78.)

O'Connell came to see Agent Shurlock in Monterey to discuss with him certain fraud allegations filed by husband against Salinas Valley Ice Co. (Tr. 78.) The original contained about 45 fraud allegations. Subsequently, husband supplied additional items making a total of about 68 or 70 fraud allegations. (Tr. 78 and 79.) The allegations supplied by husband were typewritten and contained a brief outline of the matter contained in each. (Tr. 79.)

The audit was started in May 1947 and Agent Shurlock saw husband in connection with the list of allegations. Agent Shurlock had contact with husband all through the summer of 1947 until about the fall of 1947. Agent Shurlock worked with husband and

got in touch with him quite often in connection with the various allegations. The two of them went through these various allegations. (Tr. 79 and 80.)

Husband supplied the last of the 68 or 70 fraud allegations about June 1947. (Tr. 80.)

Agent Shurlock submitted his final report on the Salinas Valley Ice Co. in July 1948. (Tr. 80.) A protest was filed to the report and the case went to the Conference Section. The conferee was Bruce Brace. (Tr. 80.)

According to Agent Shurlock's recollection, the case of the Salinas Valley Ice Co. was closed around 1950. (Tr. 81.) He discussed the case with husband the last time about September 1947. (Tr. 81 and 82.)

Agent Shurlock saw husband after September 1947. He saw him most of the time at petitioners' home in Carmel. They were personal friends. (Tr. 82.) Mrs. Shurlock and wife were good friends, they played the piano together. (Tr. 82.)

Petitioners were two or three times in the home of Agent Shurlock. (Tr. 83.)

In 1948 and 1949 the nature of conversations between Agent Shurlock and husband generally speaking was "When am I going to get my reward?" (Tr. 83.) There was quite a bit of reminiscing about the tax matter. The two of them would "discuss some of the issues involved" in which husband had furnished information. Agent Shurlock would discuss and "go over the points" with husband that the agents brought out. (Tr. 83.) The best knowledge of Agent Shurlock

is that husband furnished the last information in the fall of 1947. (Tr. 83.)

Frank Myers was the president of the Salinas Valley Ice Co., his son was Ralph Myers, the manager of the Ralph E. Myers Company of the Farming and Vegetable Branch. (Tr. 83.)

There wasn't any indication that Frank Myers was involved in defrauding the Government. All the fraudulent transactions took place in the books of the Ralph E. Myers Company branch. (Tr. 83 and 84.) Ralph E. Myers died in 1946. (Tr. 84.)

Agent Shurlock was asked by his superiors to write a report assessing the value, if any, of the information furnished by husband, which information served the Government's purposes. (Tr. 84.) He submitted such report in about May 1950. (Tr. 84.)

(Petitioners' Exhibit #4 is a letter dated November 9, 1951 from husband to Administrative Assistant Secretary Parsons of the Treasury Department. (Tr. 94 and 95.) In this letter husband wrote, among others, ". . . I feel that I have done all in my power to cooperate with your various people that called upon me for additional information from time to time . . .") Agent Shurlock speaking from his experience would say that husband cooperated fully with him. (Tr. 96.)

Agent Shurlock was assigned to the Myers' fraud case in April 1947 and he at that time had some 45 items of fraud allegations to examine. He also ex-

amined the 23 supplemental allegations of fraud supplied by husband later. Agent Shurlock's report was not submitted until July 1948. Agent "can't be sure" that he never talked to husband about the fraud allegations from September 1947 to July 1948. (Tr. 98 and 99.)

Even though Agent Shurlock can't be sure that he did not talk to husband about the fraud case between September 1947 and July 1948, he does not believe that he talked to him in May 1948. (Tr. 99.) He could have talked to husband within a month of September — it could have been October or November 1947. (Tr. 99.)

(It was stipulated that Agent Shurlock reported to his superiors on May 11, 1950 that "The information supplied by the informer (i.e. husband) was of good value in the investigation, generally speaking, it was specific, based on facts and conveying details which saved time in running down leads and resulted in large adjustment to taxable net income." (Tr. 101.))

When Agent Shurlock wrote in his report about "details of information," he had in mind the 68 allegations supplied by husband, that is all. He never received from husband "any documentary evidence, further studies or copies of other documents made by him of the books and records" of the companies involved in the tax fraud. (Tr. 101.)

Findings of Fact and Opinion (Tr. 23-33) and Decision (Tr. 33) adverse to petitioners was entered on December 17, 1957.

**Questions Involved.**

(1) Whether petitioners properly applied the benefit of Section 107(a) of the Internal Revenue Code of 1939 on their 1952 income tax return to the award of Sixty-eight Thousand Eight Hundred Thirty-seven and 96/100 (\$68,837.96) Dollars.

(2) Whether the deficiency claimed by respondent in the amount of Eighteen Thousand Three Hundred Fifty and 23/100 (\$18,350.23) Dollars, or any amount, is due from petitioners.

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**SPECIFICATION OF ERRORS.**

1. Appellants are entitled to the benefit of Section 107(a) of the Internal Revenue Code of 1939 with reference to their 1952 income tax return on which they reported as income an informant award of \$68,837.96. Section 107(a) is applicable because appellant husband who supplied the information to the Internal Revenue Service expended more than thirty-six (36) months in gathering and supplying the information on which said award was based.

2. Services rendered by appellant husband in gathering and supplying information to the Internal Revenue Service, on the basis of which information additional taxes were recovered by the Department were personal services rendered within the meaning of Section 107(a) of the Internal Revenue Code. Such services covered a period longer than thirty-six (36) months; therefore, appellants in reporting the award

of \$68,837.96 on their 1952 joint income tax return, properly allocated the same over a period during which the services were rendered, and they are entitled to the benefits of said Section 107(a).

3. Appellant husband who informed the Internal Revenue Service as to the alleged irregularities on the books of a taxpayer, was instructed by said Service to proceed with the gathering of detailed information as to such alleged irregularities and complied with the instructions. The period, which was expended by him in gathering such information as instructed, is includable in the period during which personal services were rendered by appellant husband to the Internal Revenue Service in accordance with Section 107(a) of the Internal Revenue Code of 1939.

4. Appellant husband, having supplied to the Internal Revenue Service the information gathered by him concerning the alleged irregularities on the part of a certain taxpayer, was instructed by said Service to continue to supply to it explanations and clarifications of the information supplied, which appellant husband did. The period of time during which appellant husband was ready, willing and did supply such clarification and explanation to the Internal Revenue Service is considered part of the period under Section 107(a) during which personal services were rendered.

5. The holding of the Tax Court that "an informer's award received by appellant husband of \$68,837.96 did not qualify for treatment under Section 107(a),



Internal Revenue Code of 1939, since services leading to award did not extend over a 36-month period” is erroneous because it is contrary to the fact.

6. The holding of the Tax Court that “an informer’s award received by appellant husband of \$68,837.96 did not qualify for treatment under Section 107(a), Internal Revenue Code of 1939, since services leading to award did not extend over a 36-month period” is erroneous because it is contrary to law.

7. The holding of the Tax Court that “an informer’s award received by appellant husband of \$68,837.96 did not qualify for treatment under Section 107(a), Internal Revenue Code of 1939, since services leading to award did not extend over a 36-month period” is erroneous because it is contrary to law and the facts.

8. The Tax Court’s order and decision of December 12, 1957, “that there is a deficiency in income tax of \$18,350.23 for the taxable year 1952,” as far as these appellants are concerned, is erroneous because it is contrary to the facts.

9. The Tax Court’s order and decision of December 12, 1957, “that there is a deficiency in income tax of \$18,350.23 for the taxable year 1952,” as far as these appellants are concerned, is erroneous because it is contrary to law.

10. The Tax Court’s order and decision of December 12, 1957, “that there is a deficiency in income tax of \$18,350.23 for the taxable year 1952,” as far as

these appellants are concerned, is erroneous because it is contrary to the facts and the law.

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**STATUTES INVOLVED.**

26 U.S.C.A. Secs. 6211-15, Secs. 7442, 7453, 7482 and 7483 (I.R.C. 1954).

26 U.S.C.A. Sec. 22(a) (I.R.C. 1939); 26 U.S.C.A. Sec. 61 (I.R.C. 1954).

26 U.S.C.A. Sec. 107(a) (I.R.C. 1939); 26 U.S.C.A. Sec. 1301 (I.R.C. 1954).

26 U.S.C.A. Sec. 3792 (I.R.C. 1939); 26 U.S.C.A. Sec. 7623 (I.R.C. 1954); 26 U.S.C.A. Sec. 1141 (I.R.C. 1939).

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**ARGUMENT.**

I.

APPELLANTS ARE ENTITLED TO THE BENEFIT OF SECTION 107(a) OF THE INTERNAL REVENUE CODE OF 1939 WITH REFERENCE TO THEIR 1952 INCOME TAX RETURN ON WHICH THEY REPORTED AS INCOME AN INFORMANT AWARD OF \$68,837.96. SECTION 107(a) IS APPLICABLE BECAUSE APPELLANT HUSBAND WHO SUPPLIED THE INFORMATION TO THE INTERNAL REVENUE SERVICE EXPENDED MORE THAN THIRTY-SIX (36) MONTHS IN GATHERING AND SUPPLYING THE INFORMATION ON WHICH SAID AWARD WAS BASED.

The uncontradicted testimony shows that husband was an employee of the R. E. Myers Co. of Salinas, California. His employment began in February 1941 and continued until March 1946. (Tr. 45 and 51.) He was an office manager working under the immedi-

ate supervision of R. E. Myers. (Tr. 45.) He was not in charge of the tax records kept, nor did he prepare the tax returns, but that work evolved upon a certified public accountant named Emmett Gottenberg. (Tr. 46.)

During the years 1942 and 1943 husband repeatedly made objections to his employer R. E. Myers about alleged fraudulent tax entries on the books of the R. E. Myers Co., expressing misgivings about the practice and warning the employer that he will expose himself to tax fraud charges. The employer sloughed off the objections as well as the warnings by stating that the husband had nothing to do with the bookkeeping and with the tax matter, but that such work was done by the accountant Emmett Gottenberg. (Tr. 46.)

The alleged fraudulent tax practices having been continued and the husband being worried about possible involvement in future fraud charges, went in 1944, together with the wife, to San Francisco and talked there to some Government men to find out just what he should do to protect himself. The visit of 1944 was to the Internal Revenue Service where the husband may have seen a Mr. Boland of that Service. He was advised that he should make records, which he began to keep in February or March 1944. These records were prepared at home or at the office during very late hours at night. The copies made of the false book entries were kept in petitioners' home in an old safe. (Tr. 49 and 50.)

Just prior to March 1946 the employer Ralph Myers discharged husband for the reason that he was

“interfering with the bookkeeping of the company and with the ways the entries were made.” His employment was terminated as of March 1946. (Tr. 50.)

To do something for the family after the husband was fired from his job as office manager, Ralph Myers offered to the wife one-half interest in his Tassajara Hot Springs, provided the wife would take over the management, which she did, taking her husband with her to assist her in the running of the place. (Tr. 51.)

While in Tassajara, the husband upbraided accountant Gottenberg for making the false entries on the books of the R. E. Myers Co., and also that because of the false bookkeeping he, the husband, lost his job. Gottenberg justified himself by saying that the bookkeeping was not the husband's business and that he had no right to interfere therewith. (Tr. 52.)

In the summer of 1946 Ralph Myers was killed in an accident, and thereafter his family insisted that petitioners give up not only the management but also all interest in the Tassajara Hot Springs, and when they demurred by claiming one-half interest having been given to them by the late Ralph Myers, they were threatened by the family and gave up Tassajara. (Tr. 53.) The husband continued being disturbed about the false tax entries on the books of the R. E. Myers Co. and went to San Francisco to the Internal Revenue Service in February 1947. The wife accompanied him when he saw J. J. Boland,

Deputy Collector of the Internal Revenue Service in San Francisco. The husband reported about his observation and about the copies of the false book-keeping records of his former employer, and Boland asked him for a great deal more information than he supplied at that second visit. Petitioners were also informed by said Boland that Internal Revenue agents were going to contact them. That was accordingly done and three Internal Revenue agents came to visit petitioners' home to obtain information concerning the fraud of the taxpayer. (Tr. 59.)

Internal Revenue agents were coming back to petitioners' home for a long time that seemed to continue for an eternity. Their visits were pertaining to information as to the tax fraud. The agents assured husband that but for his information and records the Department never would have found any proof of the tax fraud. The agents received from husband, first about forty-five fraud allegations, and subsequently, another twenty-three or so, making a total of sixty-eight or seventy allegations. These allegations were typewritten and contained a brief outline of the matter. (Tr. 60 and 61, 79, 80, 91.) The audit of the books of the fraudulent taxpayer began in May 1947 and husband supplied the information to the agents, working with them, going over the various allegations until the fall of 1947. (Tr. 82, 83, 91.) The agents' final report on the fraud of the taxpayer was transmitted in July 1948. (Tr. 80.)

From the above testimony, which remains uncontradicted on the record, the husband began preparing

copies of fraudulent tax entries on his employer's books not later than March 1944, after he consulted with Boland of the Internal Revenue Department in San Francisco. (Tr. 48.) He gathered information and made the copies on his own time, late at night. (Tr. 49.) He supplied about forty-five fraud specifications in February 1947 (Tr. 79), and supplied about twenty-three more in June 1947. He worked with the agents, going over the allegations in connection with the tax charges, until at least September 1947 or the fall of 1947. (Tr. 81, 82.)

The information supplied by the husband resulted in large adjustment to tax net income of the fraudulent taxpayer. (Tr. 101.) The award of \$68,837.96 was allowed to him in the case of "Salinas Valley Ice Co., Ltd., R. E. Myers, deceased" to be paid to him as "salaries, expenses, Bureau of Internal Revenue." (Exhibit 1-A, Tr. 57.)

The award paid to husband was for personal services rendered by him to the Bureau of Internal Revenue, and the rendering of these services began not later than March 1944 and did not cease earlier than September 1947, thus covered a period of three years and seven months for a total of forty-three months.

Petitioners claim that the award of \$68,837.96 received by them in 1952 is taxable invoking the benefits of Section 107(a) of the Internal Revenue Code.

Respondent maintained during the trial of this cause that husband's services, if any, began in February 1947 when he supplied the written specifications

and terminated in the fall of 1947, covering less than thirty-six months. However, it was held that

“It’s a matter of common knowledge that a large proportion of professional employment does not occur under accurate contracts stipulating in advance the terms of payment.”

*Guy C. Myers*, 11 U.S.T.C. 447.

In the instant case the Internal Revenue Department advised the husband to keep records and copies of the alleged fraudulent book entries of his employer. He did so, beginning not later than March 1944. He prepared those copies on his own time late at night, either at home or in his office, and therefore, these were extraordinary services done on his own time for the benefit of the Internal Revenue Department. Having worked in preparing the records for a period not less than forty-three months, the compensation received by the husband in the form of award is to be considered compensation for long term services and may be spread over a period of such services and reported for tax accordingly. So it was held in *Harry L. Addison*, 3 U.S.T.C. 427.

Respondent, in denying petitioners’ right to apply Section 107(a) of the Internal Revenue Code to the calculation of the tax due on the award of \$68,837.96, seems to claim that the services rendered by informant are not personal services contemplated in said section. Such contention is contrary to reason. The services rendered were personal services, and since they were performed during a period covering more than thirty-six months the benefits of Section 107(a) accrue.

In the case of *Herbert Stein*, 14 U.S.T.C. 494, it was held that the amount of first prize award received by a taxpayer for his manuscript on post war employment given to him by a brewing company for advertising purposes was compensation for services. If the information supplied by taxpayer Stein to the brewing company was recognized by the court as compensation for "services," it is maintained that the information supplied by husband here to the Internal Revenue Department resulting in the recovery of substantial additional taxes is to be considered services and the award as compensation must be considered compensation for services rendered.

On the basis of the record as above which stands uncontradicted, and particularly on the testimony of wife which remained wholly uncontradicted, and of the decisions hereinabove and hereinafter cited and applicable to the facts, it is abundantly clear that the findings of fact of the Tax Court are so clearly erroneous that this Honorable Court ought to reverse the same; that it is respectfully submitted that this Court ought to hold that Section 107(a) of the Internal Revenue Code is applicable to the award of \$68,837.96 received in 1952; and that the spreading of the award be for a period not less than forty-three months. Further, the findings of fact of the Tax Court are not supported by any evidence and ought to be reversed on the authority of *Maytag v. C.I.R.*, 187 F.2d 962. *Wisdom v. U. S.*, C.A. Cal. 1953, 205 F.2d 30. *Durwood v. C.I.R.*, C.C.A. 8, 1947, 159 F.2d 400.



On the basis of the record as above, which stands uncontradicted, and of the decisions hereinabove cited and applicable to the facts, it is respectfully submitted that this Court ought to hold that Section 107(a) of the Internal Revenue Code is applicable to the award of \$68,837.96 received in 1952, and the spreading of the award be for a period not less than forty-three months.

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## II.

**SERVICES RENDERED BY APPELLANT HUSBAND IN GATHERING AND SUPPLYING INFORMATION TO THE INTERNAL REVENUE SERVICE, ON THE BASIS OF WHICH INFORMATION ADDITIONAL TAXES WERE RECOVERED BY THE DEPARTMENT, WERE PERSONAL SERVICES RENDERED WITHIN THE MEANING OF SECTION 107(a) OF THE INTERNAL REVENUE CODE. SUCH SERVICES COVERED A PERIOD LONGER THAN THIRTY-SIX (36) MONTHS; THEREFORE, APPELLANTS IN REPORTING THE AWARD OF \$68,837.96 ON THEIR 1952 JOINT INCOME TAX RETURN, PROPERLY ALLOCATED THE SAME OVER A PERIOD DURING WHICH THE SERVICES WERE RENDERED, AND THEY ARE ENTITLED TO THE BENEFITS OF SAID SECTION 107(a).**

It is admitted that husband's first trip to the Internal Revenue Department in the early part of 1944 was for the purpose of obtaining advice, how to protect himself against possible involvement in future tax fraud charges to be brought against his employer. Whatever the husband's motivation might have been in seeking the advice, the information disclosed was used by the Internal Revenue Department for tax collection purposes. In any case, the advice given by the Internal Revenue Department through Boland resulted in husband's continued work, beginning in

March 1944, to copy the fraudulent records. Of course, it is to be assumed that the Internal Revenue Department is not interested in pursuing a person who is innocent of the tax fraud of his employer and, therefore, the advice as to the keeping of the records. However, the primary purpose of the Internal Revenue Department is to collect all taxes justly due to the Government and, therefore, as far as the Department was concerned the keeping of the records, beginning with March 1944, served one purpose and that is to collect additional taxes if those records prove the taxes are due.

Internal Revenue Agent Shurlock reported on May 11, 1950, that "the information supplied by the informer" (that is husband) "was of good value in the investigation, generally speaking, it was specific, based on facts and conveying details and resulted in large adjustment to taxable net income." (Tr. 101.)

It is apparent from the whole of the record that the husband first supplied information to the Internal Revenue Department not later than March 1944. (Tr. 48, 49.) It is admitted that the first information was not nearly complete enough to base thereon an audit of the books of the fraudulent taxpayer; in fact, the information supplied was not complete even in February 1947 when the husband visited the Internal Revenue Department the second time giving the information to Deputy Collector Boland. (Tr. 43, 54.) Even though the husband, following the advice received from the Internal Revenue Department in February or March 1944, began preparing his record copies and

continued doing so during the remaining months of 1944, during the year of 1945 and 1946 these records were still not sufficient, because in February 1947 Deputy Collector Boland told him that a great deal more information was going to be needed than that supplied at that visit. (Tr. 59.)

The first written information was supplied by husband to the Department in the form of typewritten brief allegations. (Tr. 91.) Additional brief allegations were supplied between April and July 1947. (Tr. 91.) The detailed information was supplied by husband to support the allegations to Agent Shurlock during the summer of 1947 until the fall of that year when the two of them went through the various allegations. (Tr. 91.)

Section 107(a) of the Internal Revenue Code is the one that petitioners attempt to invoke with reference to their 1952 tax return and particularly with reference to the informer's award received by the husband in that year in the amount of \$68,837.96.

We understand that the burden is upon petitioners to show that they come within the coverage of the above section. (*Van Hook v. United States*, 204 Fed. 2d 25.) They submit that the record made by their witness shows that they carried the burden successfully and have shown that Section 107(a) is applicable for a period of not less than forty-three months. Section 107(a) is a remedial one, and all remedial statutes should be liberally construed to give effect to the underlying principle. (See *Sovik v. Shaughnessy*, 92 Fed. Supp. 202.) The petitioners, as the record dis-

closes, have shown compliance with the requirements of Section 107(a) and respondent, therefore, is authorized and directed to extend the benefits of said section to the award received by them in 1952. Having shown that the requirements are complied with, it is the duty of respondent to apply this section, the purpose of which is to mitigate against this harshness, when the amount to be taxed was earned with the efforts of a great many years, in this case over a period of not less than forty-three months.

It is respectfully submitted that notwithstanding the fact that the first information was supplied by petitioners to the Internal Revenue Department in February or March 1944 for the purpose of protecting the husband against any possible future charges of tax fraud complicity, the information was used by the Internal Revenue Department to recover additional taxes from the fraudulent taxpayer. Such use of the information is the basis underlying the consideration under Section 107(a) of the Internal Revenue Code and, therefore, petitioners are entitled to the benefit thereof.

## III.

APPELLANT HUSBAND WHO INFORMED THE INTERNAL REVENUE SERVICE AS TO THE ALLEGED IRREGULARITIES ON THE BOOKS OF A TAXPAYER, WAS INSTRUCTED BY SAID SERVICE TO PROCEED WITH THE GATHERING OF DETAILED INFORMATION AS TO SUCH ALLEGED IRREGULARITIES AND COMPLIED WITH THE INSTRUCTIONS. THE PERIOD, WHICH WAS EXPENDED BY HIM IN GATHERING SUCH INFORMATION AS INSTRUCTED, IS INCLUDABLE IN THE PERIOD DURING WHICH PERSONAL SERVICES WERE RENDERED BY APPELLANT HUSBAND TO THE INTERNAL REVENUE SERVICE IN ACCORDANCE WITH SECTION 107(a) OF THE INTERNAL REVENUE CODE OF 1939.

To persuade his employer R. E. Myers that he ought not to keep fraudulent records, not only because his company was making enough money without cheating, but particularly because by such procedure he likely exposed himself to future tax fraud charges (Tr. 46), husband threatened to quit his employment unless the fraudulent bookkeeping ceased; however, his employer sloughed off the objections by stating that the husband had nothing to do with the books nor with the tax work, such work was done by a public accountant. (Tr. 46.)

The continued fraudulent bookkeeping made the husband worry on his own account, too. He feared that future tax fraud charges may involve him, too. (Tr. 48.) In 1944 the husband went to San Francisco and phoned to the Internal Revenue Service for an appointment. He saw an employee of the Revenue Service who very likely was Mr. Boland. (Tr. 48 and 74.) The husband told about his worry concerning his employer's fraudulent tax bookkeeping and wanted to know what he should do to protect himself

against possible future charges of fraud complicity. He was told that he should make records of the false entries and keep that as evidence. He began to keep such records in February or March 1944. The work involved in the keeping of the records was always late at night on his own time, either at home or at the office. The keeping of the false bookkeeping entries were continued to be made during the whole year of 1945 and of 1946. The copies were kept at home in a safe. (Tr. 48-49.)

The above testimony is uncontradicted, and therefrom it appears that the Department received information from husband as to the alleged fraud of a taxpayer. Husband was instructed to keep records, which he did, beginning with February or March 1944. In about March 1946 husband was fired from his job.

In February 1947 he turned over to the Internal Revenue Department some forty-five specifications as to the taxpayer's fraud. (Tr. 71, 78 and 79.) The forty-five allegations outlined briefly the fraud charged. (Tr. 78.) The Internal Revenue Service began an audit of the taxpayer's books in May 1947 and the agents for the Department were in contact with the husband all through the summer of 1947 until about the fall of that year. One agent got in touch with the husband quite often in connection with the various allegations and they went through them. (Tr. 78, 80.) Additional allegations were supplied by the husband in June 1947. (Tr. 80.)

Husband offered to the Internal Revenue Service the first information of the alleged fraud of the tax-

payer in February or in March 1944; pursuant to the recommendations made to him by the Service, prepared copies of the false bookkeeping records during the last ten months of 1944, during the twelve months of 1945 and the first two months of 1946, for a period of twenty-four months. He kept these records during the remainder of 1946, that is, for ten months and the first two months of 1947, that is for another additional twelve months, when on or before February 22, 1947, on the basis of the copies of the records kept by him, he turned over to the Service some forty-five short allegations of the tax fraud. (Tr. 48, 49, 53, 59 to 63, 65, 66, 71 to 74, 79.)

Respondent contends that the thirty-six months which transpired between husband's first giving information to Revenue Service in February or March 1944 until February 22, 1947, when he supplied the allegations, are to be left without consideration because such preliminary work is not part of the time spent on personal services. As we understand, respondent bases its argument on the assumption that since the husband obtained suggestions from the Internal Revenue Service as to the keeping of the records to protect himself against possible charges, the Service itself was not interested in the possible tax fraud at all. Such an assumption is not conceivable to us, but rather assume that Mr. Boland, Deputy Collector in San Francisco (or whosoever the person may have been that husband talked to in the early part of 1944) was well aware of his duty and having obtained information of possible substantial tax fraud proceeded

on such information pursuant to law that made it incumbent upon the Revenue Service to collect taxes when such taxes were due.

The thirty-six months during which husband made copies are part of the period during which he performed personal services for the Treasury Department.

The Court so held in *Smart v. Commissioner*, 152 Fed. 2d 333.

In that case the question involved was the commission earned by a trustee. After the trustee succeeded in satisfying the Court upon an accounting as to his stewardship, it was held by the Court that it is natural to think of what he then receives as having been earned progressively.

In the instant case, the record discloses that the husband informed the Revenue Service in February or March 1944 as to the tax fraud of a taxpayer. He was told to keep records, which he did, during the subsequent twenty-four months, that is, until March 1946. For the next twelve months he prepared a summary of the copies kept by him of the false records, and such summary he turned over in the form of allegations to the Revenue Service on or before February 22, 1947. Those thirty-six months are to be considered part of the period of personal services rendered, and the award received by him from the Treasury Department in 1952 is to be considered "as having been earned progressively" during a period that includes the thirty-six months of preparatory work.



After February 1947 husband worked with the agents of the Revenue Service at least until September 1947, for another seven months, so the minimum period during which husband's personal services were rendered covers forty-three months. The award of \$68,837.96, therefore, is taxable pursuant to Section 107(a). The contrary holding of the Tax Court is in error, and it ought to be reversed.

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#### IV.

**APPELLANT HUSBAND, HAVING SUPPLIED TO THE INTERNAL REVENUE SERVICE THE INFORMATION GATHERED BY HIM CONCERNING THE ALLEGED IRREGULARITIES ON THE PART OF A CERTAIN TAXPAYER, WAS INSTRUCTED BY SAID SERVICE TO CONTINUE TO SUPPLY TO IT EXPLANATIONS AND CLARIFICATIONS OF THE INFORMATION SUPPLIED, WHICH APPELLANT HUSBAND DID. THE PERIOD OF TIME DURING WHICH APPELLANT HUSBAND WAS READY, WILLING AND DID SUPPLY SUCH CLARIFICATION AND EXPLANATION TO THE INTERNAL REVENUE SERVICE IS CONSIDERED PART OF THE PERIOD UNDER SECTION 107(a), DURING WHICH PERSONAL SERVICES WERE RENDERED.**

The previous subdivisions I to III presented only such evidence that remained uncontradicted on the record. On the basis of such uncontradicted testimony it was argued that the award of \$68,837.96 is taxable pursuant to Section 107(a) as payment for services rendered over a period of forty-three months.

Now, we shall propose to show that even on the basis of testimony that is contradicted on the records that the personal services rendered extended over a

period of more than seventy months, and not less than sixty-one months.

The wife testified that Revenue Agents visited petitioners' home to obtain information concerning the tax fraud during the years 1947, 1948 and 1949. (Tr. 59 to 61.) Wife also testified that John Boland, Deputy Collector, Internal Revenue Department in San Francisco, called husband to San Francisco in 1950; that both of them went to see Boland during which time husband was asked for additional information. (Tr. 63.) The wife testified about a letter written by Mr. Parsons, Assistant Secretary of the Treasury in Washington, to the husband. This letter (Exhibit 3, Tr. 92, 93) which is dated September 19, 1951, informed the husband that his claim for the award "is receiving active consideration; however, it has been found necessary to request additional information from the Field Office in California and your case cannot be concluded until that information is received at Headquarters."

If wife's above testimony would have remained uncontradicted, it is submitted that the period of services rendered by the husband for which the award was given to him would have extended from March 1944 to at least September 10, 1951, that is, over a period of seventy-nine months. The wife's testimony with reference to personal services rendered by the husband after September 1947 is contradicted by Revenue Agent Shurlock. Considering the whole of the testimony of the government's witness, the same must be considered so unsubstantial that it will not support

the findings of fact of the Tax Court. We submit, further, that the government's witness's testimony is so incredible that the whole of it must be disregarded and, therefore, the findings of fact ought to be set aside by this Court because the same are clearly erroneous. *Johns v. C.I.R.*, 180 F. 2d 469; *Cronin's Estate v. C.I.R.*, C.C.A. 6, 1947, 164 F. 2d 561; *Tennessee Consol. Coal Co. v. C.I.R.*, C.C.A. 6, 1944, 145 F. 2d 631; *Lawton v. C.I.R.*, C.C.A. 6, 1947, 164 F. 2d 380. See, also, *Kent v. C.I.R.*, C.A. 6, 1948, 170 F. 2d 131.

Agent Shurlock recalls, at least on direct testimony, that husband worked with him quite often in connection with the various allegations as to the fraud until about the fall of 1947. (Tr. 83.) He also recalls that he discussed the case with husband about September 1947. (Tr. 79, 82.) This Agent saw husband after September 1947 but such get together was as personal friends. (Tr. 82.) When Agent Shurlock got together with husband in 1948 and 1949 they had conversations, and generally speaking the conversation was "When am I going to get my reward?" (Tr. 83.) During these later years there was quite a bit of reminiscing between the two about the tax matter. They would "discuss some of the issues involved" on which husband had furnished information. The two of them would discuss "and go over the points" which were brought out as to the tax fraud. (Tr. 83.)

On the face of such testimony, it is submitted that Agent Shurlock cannot be believed because it does not stand to reason that he would waste his time during the years of 1948 and 1949 to visit with the husband

if the conversation between the two of them was nothing more than generally speaking, "When am I going to get my reward." It is much more likely that the get together between the agent and the husband in the years of 1948 and 1949 was for the purpose testified to by the wife and affirmed by the agent when he said that he and the husband would "*discuss some of the issues involved.*" (Tr. 83.) It is much more likely that Agent Shurlock was telling the truth when he testified that in 1948 and 1949, he and the husband would discuss and "*go over the points*" with reference to the tax fraud that was "*brought out.*" (Tr. 83.)

Doubt is cast upon the truthfulness of Agent Shurlock, who on direct examination testified that the last discussion between him and the husband was in about September 1947 (Tr. 81, 82), while on cross-examination he "**can't be sure**" *that he never talked to husband about the fraud allegations from September 1947 to July 1948.* (Tr. 99.) While he cannot be sure as to the dates, he doesn't think that he talked to the husband about the fraud allegations in May 1948. He could have talked to him in October or November 1947. (Tr. 99.) Thus, Agent Shurlock's testimony on cross-examination as to the dates becomes less positive than it was on direct examination. Considering his obvious lack of candor in remembering important matters, his testimony becomes totally unreliable. He testified that he was the agent in charge of the audit of the fraud allegations against the taxpayer reported upon by husband; however, he doesn't remember the details concerning fraud assessment against the fraud-

ulent taxpayer. On that score he "would have to refresh my mind with looking at my report. *It is so long ago I would not remember what I recommended.*" (Tr. 96, 97.) In other words, Agent Shurlock is unable to recall the significant fact as to his recommendation for or against fraud assessment. He doesn't remember it because it was so long ago. On the other hand, he remembers that his conversation with husband as to the tax fraud records took place in September 1947. With such hazy memory, we believe that Agent Shurlock's testimony contradicting the testimony of the wife ought to be wholly disregarded.

Testimony of respondent's witness Shurlock ought to be disregarded for the further reason that the same is inherently improbable. The improbability appears on the basis of his own testimony.

Agent Shurlock testified that the audit of the books of the fraudulent taxpayer began in May of 1947. (Tr. 79.) Husband supplied an original list of about forty-five fraud allegations (Tr. 79) and, subsequently, he furnished additional allegations making a total of sixty-eight or seventy. (Tr. 79.) The allegations were typewritten "with no headings, just as a sort of brief outline of each of the, of the matter involved in each allegation." (Tr. 79.) Agent Shurlock saw husband and discussed the sixty-eight or seventy allegations "all through the summer of 1947 . . . to until about the fall of '47 I worked with him, I got in touch with him quite often in connection with, as we went through these various allegations." (Tr. 79, 80.)

If Agent Shurlock's testimony can be believed, he obtained all the information that the husband gathered from March 1944 to February 1947, and covering some sixty-eight or seventy tax allegations, during the short period of time from May to about September 1947, that is, in about three or four months. Agent Shurlock then worked on his final report that he submitted to his superiors in July 1948. (Tr. 80.) Even though he met husband between September 1947 and July 1948 and even in 1949, he never talked to him again about the tax matter. (Tr. 82, 83.)

The inherent improbability of Agent Shurlock's testimony is obvious. More so because the tax fraud case was not closed until "around 1950" (Tr. 81) and Agent Shurlock did not submit his own report concerning the value of the information supplied by husband until "about May 1950." (Tr. 84.) In this report Agent Shurlock evaluated the information supplied by the husband as follows: "The information furnished by the informer was of good value in the investigation. Generally speaking, it was specific, based on facts and conveying details which saved time in running down leads and resulted in large adjustments to taxable net income." (Tr. 101.)

The contradiction in Agent Shurlock's testimony stands out bold when we recall that he got the sixty-eight or seventy allegations from husband between April and May 1947. (Tr. 78, 79.) These allegations may have been supplied to him between April and July 1947. (Tr. 91.) In any case, the sixty-eight or seventy allegations were "just as a sort of brief

outline of each of the, of the matter involved in each allegation." (Tr. 79.) Agent Shurlock also testified that he "never received anything from him (the husband) any documentary evidence, further studies or copies of other documents made by him of the books and records of" the fraudulent taxpayer. (Tr. 101.) The question then arises how could the information supplied by husband be specific; how could it convey details as it was stated by the self same agent in his report of May 1950. (Tr. 101.) The further question arises and that pertains to the uncontradicted fact that the Internal Revenue Service suggested to the husband in February or March 1944 to prepare copies of the fraudulent book entries of the taxpayer charged. The uncontradicted testimony shows that such records were kept from that day on until at least March 1946. In face of the uncontradicted testimony, it is not believable that Agent Shurlock, in charge of the audit, would not have asked to see the documents which were copied, particularly when the amount of the additional taxes to be recovered was large, as his report of 1950 stated it to be. (Tr. 101.)

It is submitted that Agent Shurlock's testimony, contradicting the testimony of the wife cannot be believed and that her testimony ought to be accepted that personal services were rendered by husband during the years 1948, 1949 and 1950, and considering Exhibit 3, that is, the letter of Mr. Parsons of September 19, 1951, (Tr. 92, 93) it must be accepted that the personal services of husband covered the whole period from March 1944 to September 1951 for a total of seventy-nine months.

There is another piece of uncontradicted testimony, and that is the letter of husband to Wm. W. Parsons, Administrative Assistant Secretary, Treasury Department, Washington, D. C., which letter is dated November 9, 1951 and is marked as Petitioners' Exhibit 4. (Tr. 94, 95.) In this letter the husband writes to the Treasury Department that "I feel that I have done all in my power to cooperate with your various people that called upon me for additional information from time to time." There was no denial, nor was there contrary evidence presented by respondent that the husband in Exhibit 4 did not tell the truth. The record shows that he did cooperate with the various people of the Treasury Department who called upon him for additional information from time to time. The record is clear that husband was called to the Revenue Service by Assistant Collector Boland in 1950 and was asked for additional information. The evidence is uncontradicted, as is presented by Exhibit 3, that in September 1951 the Treasury Department needed additional information, and since the husband did cooperate and supplied additional information as he was called upon from time to time, the period of personal service extends up to September 1951, and Section 107(a) ought to be applied to the award received in 1952 covering a period of seventy-nine months.



## V.

THE HOLDING OF THE TAX COURT THAT "AN INFORMER'S AWARD RECEIVED BY APPELLANT HUSBAND OF \$68,837.96 DID NOT QUALIFY FOR TREATMENT UNDER SECTION 107(a), INTERNAL REVENUE CODE OF 1939, SINCE SERVICES LEADING TO AWARD DID NOT EXTEND OVER A 36-MONTH PERIOD" IS ERRONEOUS BECAUSE IT IS CONTRARY TO THE FACT.

The uncontradicted testimony shows that husband, as recommended to him by the Internal Revenue Service of San Francisco, began making copies of the fraudulent book entries of the company involved in February or March 1944. (Tr. 49.) Agent Shurlock, in charge of the audit, submitted his final report resulting in large additional taxes assessed against the fraudulent taxpayer in July 1948. (Tr. 99.) The husband at no time refused to supply information or make himself available for consultation to the agents, but to the contrary, he was always at the disposal of the Revenue Service. As the wife testified, the husband "gave them" (agents of the Revenue Service) "everything they asked for and everything they wanted." (Tr. 71.)

It is nothing but common sense to assume that the husband who was anxious to receive his award for the information; that the husband who was always asking Agent Shurlock in 1948 and 1949 "when am I going to get my reward" (Tr. 83) would cooperate with the agents to the fullest extent possible. The record discloses that he did so and that his personal services for which the award was given to him in 1952 extended over a period not less than from March 1944

to July 1948, that is, over a period of fifty-two months. Section 107(a) ought to be declared to be applicable to the award of \$68,837.96 received in 1952 covering a period of not less than fifty-two months. Such a decision is in line with *Smart v. Commissioner*, 152 Fed. 2d 333, and also in accordance with the case of *D. G. Haley*, 16 U.S.T.C. 1462.

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## VI.

**THE HOLDING OF THE TAX COURT THAT "AN INFORMER'S AWARD RECEIVED BY APPELLANT HUSBAND OF \$68,837.96 DID NOT QUALIFY FOR TREATMENT UNDER SECTION 107(a), INTERNAL REVENUE CODE OF 1939, SINCE SERVICES LEADING TO AWARD DID NOT EXTEND OVER A 36-MONTH PERIOD" IS ERRONEOUS BECAUSE IT IS CONTRARY TO LAW.**

This Court ought to review and reverse the Tax Court decision because that Court incorrectly applied the law which pertains to the issues involved in the instant controversy. *Hormel v. Helvering*, 60 S.Ct. 619, 312 U.S. 552; *R. P. Farnsworth & Co. v. C.I.R.*, C.A.La. 1953, 203 F. 2d 490; *C.I.R. v. Erie Forge Co.*, C.C.A. 3, 1948, 167 F. 2d 71.

It is submitted that in accordance with the testimony of Agent Shurlock the case of the fraudulent taxpayer was not closed until 1950. (Tr. 81.) On the basis of such testimony the period of personal services rendered by the husband to the Internal Revenue Service, for which services he received an award

of \$68,837.96 in 1952, covered a period of approximately twenty months longer than we argued for in the previous Section V. The period of personal services rendered covers, therefore, approximately sixty-four months, and under all circumstances a period of sixty-one months, as it was set forth in petitioners' income tax return of 1952.

It is submitted that the period of sixty-one months used by petitioners in applying Section 107(a) on their 1952 income tax return to calculate the taxes due on the award of \$68,837.96, is fully justified in *Smart v. Commissioner*, 152 Fed. 2d 333; *D. G. Haley*, 16 U.S.T.C. 1462; *Guy C. Myers*, 11 U.S.T.C. 447; *Harry L. Addison*, 3 U.S.T.C. 427, and *Herbert Stein*, 14 U.S.T.C. 494, which cases were hereinabove discussed.

It is submitted that petitioners' claim that the amount of tax payable on the award of \$68,837.96 be calculated with the benefit of Section 107(a) of the Internal Revenue Code, is more than reasonable because it covers only the actual period during which the husband was ready, willing and able and did perform personal services for which he received the award. The sixty-one months excludes the time during which he negotiated the settlement of his claim. Such period, which was needed to establish his claim to the award, was held as includable in the period of service to be considered in applying Section 107(a).

In the case of *John W. Love v. United States*, 85 F. Supp. 62, it was held that payment upon termina-

tion of services, the period of establishing claim of a corporation is included in the period of service.

In the case of *Federico Stallforth*, 6 U.S.T.C. 140, it was held as in the *Love* case (*supra*) that the period used to make settlement extended the period of claim.

Because of the above holdings, it is respectfully submitted that the period used by petitioners in their 1952 income tax return, that is, sixty-one months during which the benefits of Section 107(a) applies, is more than reasonable and justified under the law applicable hereto. It is submitted that this Court so holds and, therefore, the contrary holding of the Tax Court ought to be reversed.

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#### CONCLUSION.

Petitioners submit that the award of \$68,837.96 received by husband in 1952 was for personal services rendered. They submit that such personal services covered the period beginning with March 1944 and extended to September 1951, that is for over a period of seventy-nine months, or longer. The period of personal services are to be considered in law and in good conscience and on the basis of the facts, to extend up to the time when the award was received in April 1952, that is, over an additional period of seven months, making a total of eighty-six months. In any case, the personal services cannot be held to cover

less than sixty-one months as applied to the tax calculation by petitioners on their 1952 tax return which includes the award received in the amount of \$68,837.96.

Respondent in compliance with the provisions of Section 3792 of the Internal Revenue Code of 1939, deemed it lawful and proper to pay to husband the sum of \$68,837.96. The payment was as "reward for information leading to the detection and punishment of persons violating Internal Revenue laws". (Treasury Decision 5379—C. B. 1944, 479.)

Husband in filing his claim for reward (Form 211) on February 22, 1947 (Tr. 56) did so pursuant to the above Treasury Decision 5379. The whole of the record discloses that the payment to him was for services rendered and that such services were rendered by him personally. The services *necessarily* rendered were performed during a period substantially in excess of thirty-six months. To hold, as the Tax Court did, that "petitioners have not established that Faul (husband) performed services for the Bureau of Internal Revenue over a 36-month period" (Tr. 32, 33) is *clearly* contrary to the facts. The holding that petitioners "may not claim the benefit of Section 107(a)" (Tr. 33) is clearly contrary to the law applicable to the facts.

The Tax Court clearly misapplied the law in this case. Its findings of fact are clearly erroneous in that they are not supported by any evidence and not even

by substantial evidence, therefore, the decision of the Tax Court ought to be reversed.

Dated, Carmel, California,  
June 24, 1958.

Respectfully submitted,

HEISLER & STEWART,

FRANCIS HEISLER,

CHARLES A. STEWART,

By FRANCIS HEISLER,

*Attorneys for Petitioners.*

**(Appendix Follows.)**

## **Appendix.**





## Appendix

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### TABLE OF EXHIBITS RECEIVED IN TRANSCRIPT OF RECORD\*

Petitioners' Exhibit "A"—Notice of deficiency . . . . .	Tr. 11
Petitioners'-Respondent's Joint Exhibit "1-A" (photocopy).Tr.	56-57
Petitioners' Exhibit "2"—Received but to be furnished . . .	Tr. 64
Respondent's Exhibit "C"—Letter, Elmer Faul to Boland..	Tr. 86
Respondent's Exhibit "D"—Letter, Elmer Faul to Parsons..	Tr. 88
Respondent's Exhibit "E"—Letter, Elmer Faul to Commis- sioner of Internal Revenue . . . . .	Tr. 90
Petitioners' Exhibit "3"—Letter, Parsons to Elmer Faul . .	Tr. 92
Petitioners' Exhibit "4"—Letter, Elmer Faul to Parsons . .	Tr. 95

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\*Table in accordance with Rule 18.2(f), Rules for the United States Court of Appeals (9th Circuit) as amended Aug. 21, 1957.

